

State of South Dakota

EIGHTY-SIXTH SESSION LEGISLATIVE ASSEMBLY, 2011

429S0038

HOUSE BILL NO. 1131

Introduced by: Representatives Feinstein, Blake, Dennert, Feickert, Gibson, Hunhoff
(Bernie), Jones, Kirschman, and Kloucek and Senators Sutton, Adelstein,
Buhl, and Frerichs

1 FOR AN ACT ENTITLED, An Act to lower the state sales and use tax on certain food items
2 and to increase the rate of taxation for the sales and use tax on certain goods and services.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 10-45 be amended by adding thereto a NEW SECTION to read as
5 follows:

6 There is imposed a tax of zero percent on the gross receipts from the sale of food as defined
7 in § 10-45-1.

8 Section 2. That § 10-45-1 be amended to read as follows:

9 10-45-1. Terms used in this chapter mean:

10 (1) "Agricultural purposes," the producing, raising, growing, or harvesting of food or
11 fiber upon agricultural land, including dairy products, livestock, and crops. The
12 services of custom harvesters, chemical applicators, fertilizer spreaders, hay grinders,
13 and cultivators are considered agricultural purposes;

14 (1A) "Alcoholic beverages," any beverage that is suitable for human consumption and



1 contains one-half of one percent or more of alcohol by volume;

2 (2) "Business," any activity engaged in by any person or caused to be engaged in by such
3 person with the object of gain, benefit, or advantage, either direct or indirect;

4 (3) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in
5 combination with chocolate, fruits, nuts or other ingredients or flavorings in the form
6 of bars, drops, or pieces. The term, candy, does not include any preparation
7 containing flour ~~and does not~~. No candy may require refrigeration;

8 (4) "Delivery charges," charges by the retailer for preparation and delivery to a location
9 designated by the purchaser of tangible personal property, any product transferred
10 electronically, or services including transportation, shipping, postage, handling,
11 crating, and packing. The term does not include postage for direct mail;

12 (4A) "Dietary supplement," any product, other than tobacco, intended to supplement the
13 diet that:

14 (a) Contains one or more of the following dietary ingredients:

15 (i) A vitamin;

16 (ii) A mineral;

17 (iii) An herb or other botanical;

18 (iv) An amino acid;

19 (v) A dietary substance for use by humans to supplement the diet by
20 increasing the total dietary intake; or

21 (vi) A concentrate, metabolite, constituent, extract, or combination of any
22 ingredient described in this subsection;

23 (b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid
24 form, or if not intended for ingestion in such a form, is not represented as

conventional food and is not represented for use as a sole item of a meal or of the diet; and

(c) Is required to be labeled as a dietary supplement, identifiable by the supplemental facts box, found on the label and as required pursuant to 21 C.F.R. § 101.36 as of January 1, 2011;

(5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. The term, food, does not include any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement, food sold through a vending machine, or prepared food;

(5A) "Food sold through a vending machine," any food dispensed from a machine or other mechanical device that accepts payment;

(6) Repealed by SL 2007, ch 56, § 1.

(7) "Person," any individual, firm, copartnership, joint adventure, association, limited liability company, corporation, municipal corporation, estate, trust, business trust, receiver, the State of South Dakota and its political subdivisions, or any group or combination acting as a unit;

(8) "Prepared food," any food sold in a heated state or heated by the seller; two or more food ingredients mixed or combined by the seller for sale as a single item; or food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

Prepared food does not include food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods

1 requiring cooking by the consumer as recommended by the Food and Drug
2 Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so
3 as to prevent food borne illnesses;

4 (8A) "Product transferred electronically," any product obtained by the purchaser by means
5 other than tangible storage media. A product transferred electronically does not
6 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,
7 or copyright.

8 (9) "Relief agency," the state, and county, municipality or district thereof, or any agency
9 engaged in actual relief work;

10 (10) "Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than for
11 resale, sublease, or subrent;

12 (11) "Retailer," any person engaged in the business of selling tangible goods, wares, or
13 merchandise at retail, or the furnishing of gas, electricity, water, and communication
14 service, and tickets or admissions to places of amusement and athletic events as
15 provided in this chapter, and the sale at retail of products transferred electronically.
16 The term also includes any person subject to the tax imposed by §§ 10-45-4 and 10-
17 45-5. The isolated or occasional sale of tangible personal property or any product
18 transferred electronically at retail by a person who does not hold himself or herself
19 out as engaging in the business of selling such tangible personal property or products
20 transferred electronically at retail does not constitute such person a retailer;

21 (12) "Sale," any transfer, exchange, or barter, conditional or otherwise, in any manner or
22 by any means whatsoever, for a consideration;

23 (13) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
24 sweeteners. The term, soft drinks, does not include any beverage that contains milk

or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume;

(14) "Tangible personal property," personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software;

(15) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

Section 3. That chapter 10-46 be amended by adding thereto a NEW SECTION to read as follows:

There is imposed a tax of zero percent on the privilege of the use of food as defined in § 10-46-1.

Section 4. That § 10-46-1 be amended to read as follows:

10-46-1. Terms, as used in this chapter mean:

(1) "Business," any activity engaged in by any person or caused to be engaged in by such person with the object of gain, benefit or advantage either direct or indirect;

(1A) "Alcoholic beverages," any beverage that is suitable for human consumption and contains one-half of one percent or more of alcohol by volume;

(2) "Candy," any preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. The term, candy, does not include any preparation containing flour ~~and does not~~. No candy may require refrigeration;

(3) "Delivery charges," charges by the retailer for preparation and delivery to a location designated by the purchaser of tangible personal property, any product transferred electronically, or services including transportation, shipping, postage, handling,

crating, and packing. The term does not include postage for direct mail;

(3A) "Dietary supplement," any product, other than tobacco, intended to supplement the diet that:

(a) Contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in this subsection;

(b) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

(c) Is required to be labeled as a dietary supplement, identifiable by the supplemental facts box, found on the label and as required pursuant to 21 C.F.R. § 101.36 as of January 1, 2011;

(4) "Fair market value," the price at which a willing seller and willing buyer will trade. Fair market value shall be determined at the time of purchase. If a public corporation is supplying tangible personal property or any product transferred electronically that will be used in the performance of a contract, fair market value shall be determined pursuant to § 5-18-5.1. This definition also applies to chapter 10-45;

(5) "Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. The term, food, does not include any alcoholic beverages beverage, tobacco, soft drink, candy, dietary supplement, food sold through a vending machine, or prepared food;

(5A) "Food sold through a vending machine," any food dispensed from a machine or other mechanical device that accepts payment;

(6) "Included in the measure of tax," the tangible personal property, any product transferred electronically, or the service was purchased from a retailer licensed under chapter 10-45 and that retailer has included the tax in the amount received from the sale;

(7) "In this state" or "in the state," within the exterior limits of the State of South Dakota and includes all territory within such limits owned by or ceded to the United States of America;

(8) "Prepared food," any food sold in a heated state or heated by the seller; two or more food ingredients mixed or combined by the seller for sale as a single item; or food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

Prepared food does not include food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code as of January 1, 2003, so as to prevent food borne illnesses;

1 (8A) "Product transferred electronically," any product obtained by the purchaser by means
2 other than tangible storage media. A product transferred electronically does not
3 include any intangible such as a patent, stock, bond, goodwill, trademark, franchise,
4 or copyright.

5 (9) "Purchase," any transfer, exchange, or barter, conditional or otherwise, in any manner
6 or by any means whatsoever, for a consideration. A transaction, whereby the
7 possession of property is transferred but the seller retains the title as security for the
8 payment of the price, is a purchase;

9 (10) "Purchase price," shall have the same meaning as gross receipts defined in chapter
10 10-45;

11 (11) "Retailer," any person performing services in this state or engaged in the business of
12 selling tangible personal property or products transferred electronically for use,
13 storage or other consumption within the meaning of this chapter. However, if in the
14 opinion of the secretary of revenue and regulation, it is necessary for the efficient
15 administration of this chapter to regard any salesmen, representatives, truckers,
16 peddlers, or canvassers as agents of the dealers, distributors, supervisors, employers,
17 or persons under whom they operate or from whom they obtain the tangible personal
18 property or any product transferred electronically sold by them irrespective of
19 whether they are making sales on their own behalf or on behalf of such dealers,
20 distributors, supervisors, employers, or persons, the secretary of revenue and
21 regulation may so regard them and may regard the dealers, distributors, supervisors,
22 employers, or persons as retailers for purposes of this chapter;

23 (12) "Retailer maintaining a place of business in the state," any retailer having or
24 maintaining within this state, directly or by a subsidiary, an office, distribution house,

1 sales house, warehouse, or other place of business, or any agents operating within the
2 state under the authority of the retailer or its subsidiary, irrespective of whether such
3 place of business or agent is located here permanently or temporarily or whether such
4 retailer or subsidiary is admitted to do business within this state pursuant to the laws
5 of the State of South Dakota granting the rights of foreign corporations to do business
6 in this state;

7 (13) "Secretary," the secretary of the Department of Revenue and Regulation or any duly
8 authorized and appointed assistant, deputies, or agents of the secretary charged with
9 the administration or enforcement of this chapter;

10 (14) "Soft drinks," any nonalcoholic beverages that contain natural or artificial
11 sweeteners. The term, soft drinks, does not include any beverage that contains milk
12 or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of
13 vegetable or fruit juice by volume;

14 (15) "Storage," any keeping or retention in this state for use or other consumption in the
15 State of South Dakota for any purpose except sale in the regular course of business;

16 (16) "Tangible personal property," personal property that can be seen, weighed, measured,
17 felt, or touched, or that is in any other manner perceptible to the senses if furnished
18 or delivered to consumers or users within this state. The term includes electricity,
19 water, gas, steam, and prewritten computer software;

20 (16A) "Tobacco," any cigarettes, cigars, chewing or pipe tobacco, or any other item that
21 contains tobacco;

22 (17) "Use," the exercise of right or power over tangible personal property or any product
23 transferred electronically incidental to the ownership of that property, except that it
24 does not include the sale of that property in the regular course of business. Use also

1 includes the use of the types of services, the gross receipts from the sale of which are
2 to be included in the measure of the tax imposed by chapter 10-45, and the delivery
3 or causing delivery into this state of tangible personal property or any product
4 transferred electronically intended to advertise any product or service or promote or
5 facilitate any sale to South Dakota residents.

6 Section 5. That § 10-45-2 be amended to read as follows:

7 10-45-2. There is hereby imposed a tax upon the privilege of engaging in business as a
8 retailer, a tax of four and thirty-five hundredths percent upon the gross receipts of all sales of
9 tangible personal property consisting of goods, wares, or merchandise, except as otherwise
10 provided in this chapter, sold at retail in the State of South Dakota to consumers or users.

11 Section 6. That § 10-45-5 be amended to read as follows:

12 10-45-5. There is imposed a tax at the rate of four and thirty-five hundredths percent upon
13 the gross receipts of any person from engaging or continuing in any of the following businesses
14 or services in this state: abstracters; accountants; ancillary services; architects; barbers; beauty
15 shops; bill collection services; blacksmith shops; car washing; dry cleaning; dyeing;
16 exterminators; garage and service stations; garment alteration; cleaning and pressing; janitorial
17 services and supplies; specialty cleaners; laundry; linen and towel supply; membership or
18 entrance fees for the use of a facility or for the right to purchase tangible personal property, any
19 product transferred electronically, or services; photography; photo developing and enlarging;
20 tire recapping; welding and all repair services, except farm machinery, farm attachment units,
21 or irrigation equipment repair services; cable television; and rentals of tangible personal
22 property except leases of tangible personal property between one telephone company and
23 another telephone company, motor vehicles as defined by § 32-5-1 leased under a single contract
24 for more than twenty-eight days and mobile homes. However, the specific enumeration of

businesses and professions made in this section does not, in any way, limit the scope and effect of § 10-45-4.

Section 7. That § 10-45-5.3 be amended to read as follows:

10-45-5.3. There is imposed, at the rate of four and thirty-five hundredths percent, an excise tax on the gross receipts of any person engaging in oil and gas field services (group no. 138) as enumerated in the Standard Industrial Classification Manual, 1987, as prepared by the Statistical Policy Division of the Office of Management and Budget, Office of the President.

Section 8. That § 10-45-6 be amended to read as follows:

10-45-6. There is hereby imposed a tax of four and thirty-five hundredths percent upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this chapter, when sold at retail in the State of South Dakota to consumers or users.

Section 9. That § 10-45-6.1 be amended to read as follows:

10-45-6.1. Except as provided in § 10-45-6.2, there is hereby imposed a tax of four and thirty-five hundredths percent upon the gross receipts from providing any intrastate, interstate, or international telecommunications service that originates or terminates in this state and that is billed or charged to a service address in this state, or that both originates and terminates in this state. However, the tax imposed by this section does not apply to:

- (1) Any eight hundred or eight hundred type service unless the service both originates and terminates in this state;
- (2) Any sale of a telecommunication service to a provider of telecommunication services, including access service, for use in providing any telecommunication service; or

(3) Any sale of interstate telecommunication service provided to a call center that has been certified by the secretary of revenue to meet the criterion established in § 10-45-6.3 and the call center has provided to the telecommunications service provider an exemption certificate issued by the secretary indicating that it meets the criterion.

If a call center uses an exemption certificate to purchase services not meeting the criterion established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

Section 10. That § 10-45-6.2 be amended to read as follows:

10-45-6.2. There is hereby imposed a tax of four and thirty-five hundredths percent upon the gross receipts of mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as of January 1, 2002, that originate and terminate in the same state and are billed to a customer with a place of primary use in this state or are deemed to have originated or been received in this state and to be billed or charged to a service address in this state if the customer's place of primary use is located in this state regardless of where the service actually originates or terminates. Notwithstanding any other provision of this chapter and for purposes of the tax imposed by this section, the tax imposed upon mobile telecommunication services shall be administered in accordance with 4 U.S.C. §§ 116-126 as in effect on July 28, 2000.

Section 11. That § 10-45-8 be amended to read as follows:

10-45-8. There is imposed a tax of four and thirty-five hundredths percent upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic contests or events, except as otherwise provided in this chapter.

Section 12. That § 10-45-71 be amended to read as follows:

10-45-71. There is imposed a tax of four and thirty-five hundredths percent on the gross receipts from the transportation of passengers. The tax imposed by this section shall apply to any transportation of passengers if the passenger boards and exits the mode of transportation

1 within this state.

2 Section 13. That § 10-46-2.1 be amended to read as follows:

3 10-46-2.1. For the privilege of using services in South Dakota, except those types of services
4 exempted by § 10-46-17.3, there is imposed on the person using the service an excise tax equal
5 to four and thirty-five hundredths percent of the value of the services at the time they are
6 rendered. However, this tax may not be imposed on any service rendered by a related
7 corporation as defined in subdivision 10-43-1(11) for use by a financial institution as defined
8 in subdivision 10-43-1(4) or on any service rendered by a financial institution as defined in
9 subdivision 10-43-1(4) for use by a related corporation as defined in subdivision 10-43-1(11).
10 For the purposes of this section, the term related corporation includes a corporation which
11 together with the financial institution is part of a controlled group of corporations as defined in
12 26 U.S.C. § 1563 as in effect on January 1, 1989, except that the eighty percent ownership
13 requirements set forth in 26 U.S.C. § 563(a)(2)(A) for a brother-sister controlled group are
14 reduced to fifty-one percent. For the purpose of this chapter, services rendered by an employee
15 for the use of his employer are not taxable.

16 Section 14. That § 10-46-2.2 be amended to read as follows:

17 10-46-2.2. An excise tax is imposed upon the privilege of the use of rented tangible personal
18 property and any product transferred electronically in this state at the rate of four and thirty-five
19 hundredths percent of the rental payments upon the property.

20 Section 15. That § 10-46-58 be amended to read as follows:

21 10-46-58. There is imposed a tax of four and thirty-five hundredths percent on the privilege
22 of the use of any transportation of passengers. The tax imposed by this section shall apply to any
23 transportation of passengers if the passenger boards and exits the mode of transportation within
24 this state.

Section 16. That § 10-46-69 be amended to read as follows:

10-46-69. There is hereby imposed a tax of four and thirty-five hundredths percent upon the privilege of the use of mobile telecommunications services, as defined in 4 U.S.C. § 124(7) as of January 1, 2002, that originate and terminate in the same state and are billed to a customer with a place of primary use in this state. Notwithstanding any other provision of this chapter and for purposes of the tax imposed by this section, the tax imposed upon mobile telecommunication services shall be administered in accordance with 4 U.S.C. §§ 116-126 as in effect on July 28, 2000.

Section 17. That § 10-46-69.1 be amended to read as follows:

10-46-69.1. Except as provided in § 10-46-69, there is hereby imposed a tax of four and thirty-five hundredths percent upon the privilege of the use of any intrastate, interstate, or international telecommunications service that originates or terminates in this state and that is billed or charged to a service address in this state, or that both originates and terminates in this state. However, the tax imposed by this section does not apply to:

- (1) Any eight hundred or eight hundred type service unless the service both originates and terminates in this state;
- (2) Any sale of a telecommunication service to a provider of telecommunication services, including access service, for use in providing any telecommunication service; or
- (3) Any sale of interstate telecommunication service provided to a call center that has been certified by the secretary of revenue to meet the criterion established in § 10-45-6.3 and the call center has provided to the telecommunications service provider an exemption certificate issued by the secretary indicating that it meets the criterion.

If a call center uses an exemption certificate to purchase services not meeting the criterion

1 established in § 10-45-6.3, the call center is liable for the applicable tax, penalty, and interest.

2 Section 18. That § 10-46-69.2 be amended to read as follows:

3 10-46-69.2. There is hereby imposed a tax of four and thirty-five hundredths percent upon

4 the privilege of the use of any ancillary services.